ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС; СІМЕЙНЕ ПРАВО

UDC 342.95(477:4/9)-053.2
DOI https://doi.org/10.32840/1813-338X-2021.2.2

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ALTERNATIVE WAYS FOR THE RESOLUTION OF THE DISPUTES ABOUT CHILDREN: UKRAINIAN AND FOREIGN EXPERIENCE

Research article is devoted to the study of domestic and foreign experience in the implementation of non-jurisdictional means of resolving family conflicts on children. In the context of the study, it is about the types of out-of-court settlement of the disputes on children, which include, in particular, self-defense of children's rights, mediation and its varieties, as well as techniques and technologies of mediation procedures. Additional opportunities are considered that provide such means for resolving the legal situation at the pre-trial, procedural and post-trial stages without escalation of conflicts in personal relationships, which negatively affect children. It is emphasized that court decisions in the field of family law often do not give the desired effect (are not enforced for years and eventually become obsolete) precisely because of the lack of additional procedures aimed at the establishement of communication and the necessary consensus-building between the parties. Unfortunately, there is no profile law in Ukraine today, which should regulate all important aspects and conditions of alternative ways for the resolution of the disputes about children, but the legislation of our country as well as a number of rules can be the basis of its practical application.

It is stated that, at present, alternative dispute resolution for children is an extremely common mechanism in the legal systems of different states; each of them offers its own legislative regulation of the procedures for its implementation. Their importance has stimulated the development of international cooperation in this area, which has resulted in the development of a number of documents setting international standards for such procedures. At the same time, it is noted that there is a relatively small spread of non-jurisdictional means of resolving family conflicts involving children in Ukraine. In our opinion, the full implementation of non-jurisdictional means of resolving family conflicts in Ukraine is hampered by the lack of a proper legal basis for their effective functioning (for example, a law regulating mediation activities has not yet been adopted), subjective factor related to the personal characteristics of the parties, undeveloped legal culture in society, etc. At the same time, such measures have become widespread in the advanced countries of the world and are in accordance with Article 124 of the Constitution of Ukraine.

Key words: *non-jurisdictional means of resolving family conflicts, mediation, self-defense of children's rights, family dispute, techniques and technologies of mediation procedures.*

Formulation of the issue. In this paper we will focus on the impact of family conflict on the condition and interests of the child. Thus parental divorce is one of the most difficult situations for

a child, which can leave a deep mark in the child's soul and negatively affect his future. In such cases, parents and other family members usually go to the law for the protection of their rights. As you know, the socio-cultural code of justice is the state itself. The role of the main subject in the judiciary is obviously assigned to the state, and the individual usually has the role of the object of power influence over him. At the same time, it should be recognized that prolonged (sometimes up to several years) court proceedings do not have the best effect on the fate of children. For example, lawyers tend to focus too much on the legal rights of their clients when dealing with child custody and placement issues, and pay very little attention to clarifying parents' current responsibilities. In addition, in modern law enforcement practice, many cases where due to the length of the trial, the issues with which the lawsuits are filed, lose their relevance, and the parties suffer from significant material and moral damage and time [1, p. 119]. Even in the case of a long-awaited decision of the parties, its implementation is also delayed for years, and for the most part is not implemented at all. Therefore, it seems important to find alternative, out-of-court ways to resolve disputes against children, which determines the topic of our study [2, p. 51].

Analysis of recent researches and publications. Different aspects of the research have been already studied in works of domestic and foreign authors: L.O. Andriievska, V.I. Borysova, Yu.V. Cherniak, S.V. Diachenko, L.V. Krasytska, N. Kylynnyk, N. Mazaraki, Z.V. Romovska, I.L. Serdechna, S. Tokarieva, I.V. Zhylinkova. However, several issues still need in-depth investigation for the improvement of home legislation and implementation of alternative ways for the resolution of the disputes about children into social practice.

The aim of paper is to analyse such alternative, out-of-court ways to resolve disputes against children as mediation, self-defence and related to them procedures as well as to study the perspectives of their implementation.

Body of research. Presentation of Main Article 55 of the Constitution of Ukraine states that everyone has the right to protect their rights in any manner not prohibited by law [3].

In the context of our study, we are talking primarily about this type of out-of-court settlement of disputes against children as mediation and its types, as the classic negotiations and arbitration in this category of cases are impractical. The legal status of mediation as a public good and a social service has led to the development in societies of appropriate techniques and technologies for the application of mediation procedures. The most common of these are: actual mediation, negotiations, participatory procedures, mini-hearings, simplified jury trial, independent assessment of facts, preliminary neutral assessment, ombudsman, med-arb with parallel involvement of parallel parties, plenary med-arb, med-arb with additional caveat, arb-med, private court and some others.

Mediation (in the literature there are different opinions about the origin of the concept of "mediation": from the Latin "mediatio" – to mediate, "mediare" – to be a mediator; from the Greek "medos" – neutral, independent) negotiations of the parties with the participation of a third party – a mediator, who, providing general guidance to the procedure, helps the parties to establish communication with each other and reach the most effective agreements on disputes, but isn't authorized to resolve disputes. Mediation as a certain procedure is characterized by the following features: the presence of a neutral third party – a mediator who facilitates communication between the parties; dispute resolution and development of the agreement directly by the parties, not by the mediator; lack of strict legal regulation of procedure, adversarial proceedings and binding decision; the presence of a mediation agreement and, as a rule, the impossibility of coercion [4, p. 101].

Family conflict often takes the form of a dispute when the spouses turn to jurisdictional or non-jurisdictional means to resolve it. In these cases, family mediation is again one of the most effective options for resolving the dispute. In particular, it can be used in such categories of disputes as:

– disputes regarding the determination and fulfillment of alimony obligations of spouses, parents and children, including the determination or amount of alimony;

– disputes over divorce;

– disputes concerning the maintenance of the spouses and other property relations of the spouses, parents and children, other family members;

– disputes regarding the determination of the child's place of residence and / or the participation of each parent in the maintenance and upbringing of the child;

– disputes concerning the division of property of spouses, former spouses, persons who were in a de facto marital relationship;

– disputes over the organization of contact of children with their grandparents or other relatives;

– disputes over paternity.

Nowadays, mediation is an extremely common mechanism in legal systems of different states. Each of them has its own legal regulation of mediation procedures and approaches to understanding and practical application of these tools. However, the importance of mediation has also stimulated the development of international cooperation in this area. The result of such cooperation has been the development of a number of documents that set international standards for mediation procedures.

The purpose of mediation is to discuss, understand and process a complex conflict (problem) situation to optimal recovery. There should be a discussion in the discussion of different views, opinions, often incompatible, about the events themselves or options for overcoming a difficult situation. The result of successful mediation is a concrete agreement reached during the discussion. Decisions made during mediation can be enshrined in the agreement only if each of the parties of the conflict (dispute) recognizes them [5, p. 206].

The main prerequisites for mediation are: the desire of the parties for a peaceful settlement of the conflict (dispute) and the voluntary participation of them in the mediation procedure. By joining forces to resolve the problem, instead of perceiving the opponent as an enemy, the parties of the conflict can count on reaching agreements that provide for mutual agreement – consensus (cooperation). Having reached a consensus, the parties to the conflict make a decision that allows them to constructively build further relationships and joint activities.

A mediator is a specially trained person who assists the parties to a conflict (dispute) in its settlement through mediation and does not have the authority to make a decision on the merits of the conflict (dispute). A mediator is an independent, neutral and impartial person who helps the parties of a conflict (dispute) to establish communication, negotiate and reach an agreement on the ways to resolve the conflict and conclude an appropriate agreement. Mediator training. Anyone can become a mediator under the conditions of successful special training. In Ukraine, most mediators, as a rule, have higher education (psychological, pedagogical, legal, medical, etc.) and have got an additionally received special training. Until recently, 40 hours of theoretical and practical training in basic mediator skills was considered sufficient to begin mediation practice (this is the model of mediator training typical of the United States). But the 25-year history of training mediators in Ukraine and generalizing the practice of their work has proved that it is impossible to acquire the full range of competencies of a mediator in such a short time. To date, the mediation community of Ukraine in the course of work on relevant bills, ethical principles of mediators and standards of training of mediators has agreed on the need [5, p. 158–160].

If we talk about international standards, it should be noted that they are divided into two main types depending on the source of their consolidation:

a) imperative: those enshrined in international legal instruments that are binding on the states that have acceded to them;

b) dispositive: those enshrined in international instruments of so-called “soft law” (English soft law), but do not have binding legal force and the application of which depends on the discretion and will of the subjects of legal relations.

The vast majority of documents defining international mediation standards are dispositive. There is no a multilateral international treaty that establishes appropriate mediation standards that are binding on the states parties to such a treaty. Most of them are enshrined in the decisions of bodies and organizations that belong to the United Nations (UN) system.

Unfortunately, there is no profile law in Ukraine today, which should regulate all important aspects and conditions of mediation, but the legislation of our country as well as a number of rules can be the basis of its practical application. At the end of 2015 several drafts of the Law on Mediation have been registered in the Verkhovna Rada of Ukraine. On July 5, 2019, the Verkhovna Rada registered Act of the Law No 10425 “On Activities in the Field of Mediation”. This bill suggested to settle the definition terms, principles of mediation and the procedure for its conduct both pre-trial and out-of-court settlement dispute, mediator status, procedures for acquiring the right to mediation, training requirements and responsibilities mediators [6].

The most powerful organizations established in the period 2015–2019 are the non-governmental organizations: “Lviv Mediation Center”, which annually holds the Lviv Mediation Forum, “League of Mediators of Ukraine”, which provides a volunteer project on family mediation in different areas of Kyiv, “Association of Family Mediators of Ukraine”, which makes efforts to form standards of training and practice of family mediation.

Alternative ways to resolve disputes over children also include self-defense enshrined in Ukrainian law. Self-defense of the rights of parents, children, family members, relatives scientists consider their activities without seeking help from jurisdictions and officials, in case of violation of their family rights or the existence of a real threat of such violation, by taking legal and / or factual actions, which are not prohibited by law and do not contradict the moral principles of society and are aimed at stopping the violation of family rights, suppressing the violation of family rights, restoration of violated family rights. The person himself has the right to choose the appropriate form of protection of his violated rights.

The Civil Code of Ukraine defines self-defense as the use of countermeasures that should not be prohibited by law and do not contradict the moral principles of society [6].

In family law, the term "self-defense" is used only in conjunction with the definition of rights and responsibilities of a person who due to certain features, legal grounds cannot independently protect their rights or apply for such protection to an authorized entity or court [7].

Serdechna I.L. suggests two ways to exercise the right to self-defense by other relatives in the UK:

a) the right of other relatives and family members to self-defense of their subjective right;

b) the right of other family members and relatives to self-defense of another person's right.

According to Art. 258, 259, 261 of the Family Code of Ukraine the law actually defines the right of the grandfather, the grandmother, brothers, sisters, the stepfather, the stepmother, the actual tutor on self-protection of the rights of the child. However, it does not mention the possibility of exercising the right to self-defense of one's right to the child, such as the right to education, communication, etc. by taking appropriate actions that are not prohibited by law and do not contradict the moral principles of society [7; 9].

We agree with the opinion of I.L. Serdechna that the ways of self-protection of personal non-property rights of other members and relatives of a factual nature, which are aimed at protecting violated rights of children or their own rights without recourse to jurisdictions to protect the violated right.

In the same study of I.L. Serdechna as an example of self-defense of their rights is the right of the grandfather to approach the grandson on the street and talk to him, call, visit the child in school or other institution, etc. [8, p. 124].

Given the imperfections of traditional means of resolving disputes, in Ukrainian society there is an objective need for new ways to protect their interests. The most expedient of them is the introduction of mediation – an alternative way of resolving disputes on a voluntary basis with the assistance of a neutral mediator, who directs the parties to make mutually beneficial decisions [5, p. 208].

Disputes between parents and children that cannot be resolved in court also should be mentioned in the study. In particular, these are the so-called intergenerational conflicts, when different value systems of the older and younger generations of the family collide. Despite the fact that they flare up between close people, the connection between which is natural, they can lead to a complete rupture of relations between members of the same family. Judgments resolve the legal situation, but do not always end the personal conflict. In such cases, mediation focuses on the development of mutually acceptable ways to enforce a court decision without further escalating tensions in personal relationships. Decisions made in mediation must take into account the special needs of each family. Family mediation allows to consider legal issues in a broader perspective of the daily life of the parties to the conflict.

Conclusions. Introduction of mediation and other alternative ways for the resolution of the disputes about children into Ukrainian civil process is currently hampered by a number of problems, namely: low legal culture of the population, without which it is impossible to carry out reforms to introduce certain legal institution; low level of trust in this services related to the lack of public understanding of the benefits of alternative methodologies for dispute resolution; the desire of one of the parties to satisfy only it's own interests, not wanting to compromise; the position of the society that appeal to the court is the only way to resolve the dispute; lack of legal basis and others.

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Алєксєєва О. В., Лелет С. М. Альтернативні шляхи вирішення спорів щодо дітей: український і зарубіжний досвід

Стаття присвячена вивченню вітчизняного й іноземного досвіду щодо впровадження неюрисдикційних засобів вирішення сімейних конфліктів, що стосуються дітей. У контексті дослідження йдеться про види позасудового вирішення спорів щодо дітей, до яких, зокрема, належать самозахист прав дитини, медіація та її різновиди, а також про техніки й технології застосування медіаційних процедур. Розкриваються додаткові можливості, які забезпечують такі засоби для вирішення юридичної ситуації на досудовому, процесуальному та післясудовому етапах без ескалації конфліктів у особистих відносинах, що негативно позначаються на дітях. Наголошено на тому, що судові рішення в царині сімейного права часто не дають бажаного ефекту (не виконуються роками і врешті-решт стають неактульними) саме через відсутність додаткових процедур, спрямованих на налагодження комунікації й досягнення необхідного консенсусу між сторонами. Констатовано, що натепер в Україні не існує профільного закону, який повинен регулювати всі важливі аспекти та умови для альтернативних шляхів вирішення суперечок щодо дітей, але законодавство нашої країни, зорієнтоване на міжнародну практику, низка нормативних актів цивільного та сімейного кодексів можуть становити основу для їх застосування.

Досліджено, що альтернативні шляхи вирішення спорів щодо дітей є надзвичайно поширеним механізмом у правових системах різних держав, кожна з яких пропонує власне законодавче регулювання процедур його імплементування. Їх важливість стимулювала розвиток міжнародного співробітництва в цій галузі, результатом якого стала розробка низки документів, що встановлюють світові стандарти таких процедур. Водночас зазначено про порівняно незначне поширення неюрисдикційних засобів вирішення сімейних конфліктів, що стосуються дітей в Україні. На заваді повноцінному упровадженню неюрисдикційних засобів вирішення сімейних конфліктів в Україні, на нашу думку, стоять відсутність належної правової бази для їх ефективного функціонування (наприклад, досі не прийнято закону, який би регулював діяльність у сфері медіації), суб'єктивний фактор, пов'язаний із особистісними характеристиками сторін, нерозвинена правова культура в суспільстві та ін. Разом з тим такі заходи вже давно стали невід'ємною частиною юридичної практики передових країн світу й є суголосними статті 124 Конституції України.

Ключові слова: *неюрисдикційні засоби вирішення сімейних конфліктів, медіація, самозахист прав дитини, сімейний спір, техніки і технології застосування медіаційних процедур.*